In The

Supreme Court of the United States

No. 74-1315

RAY HULEN PLESS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION

Pursuant to the Rules of the Supreme Court of the United States, respondent files this brief in opposition to the granting of petition for writ of certiorari on the grounds hereinafter stated.

The petitioner admits the convictions which bring him squarely under the "Virginia Habitual Offender Act." He seeks a writ against a finding of the Supreme Court of Virginia on January 31, 1975, in consideration of his petition for a writ of error from a judgment rendered by the Circuit Court of Accomack County on the 9th day of May, 1974, which states, in part, "the court being of opinion that there

is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court." He presents one question for determination: "1. Was the retroactive application of the Virginia Habitual Offender Act, Va. Code Ann. § 46.1-387.2 *et seq.* (Repl. Vol. 1974), Appendix, *infra, ex post facto* prohibited by U.S. Const. Art. I § 10 and U.S. Const. amend. XIV?"

Contrary to his contention, the law is not retrospective in its application inasmuch as it provides that the date of the offense most recently committed must occur on or after the effective date of the act. There is no contention by the petitioner that his record does not bring him within the scope of the act, nor does he contend that he did not commit an offense after the effective date of the act, as indicated by his convictions for "Driving While Drunk" and "Unreasonable Refusal of Blood Test" on August 7, 1972, more than twenty-five months after the act became effective. It is submitted that he had ample time to familiarize himself with the law, and its invocation against his driving privilege was brought about by his violations after the law became effective, rather than by any retrospective application of the law. The violations of the law after its effective date were of his own choosing.

The authorities found generally agree that the phrase *ex post facto* embraces only such laws as impose or affect punishment for a crime. The Virginia Habitual Offender Act neither aggravates a crime nor does it inflict a greater punishment. It simply prohibits that person from operating a motor vehicle upon the public highways whose disregard for the traffic laws and the safety of other users of the highway, as shown by his record of serious traffic violations,

demonstrates his indifference for the safety and welfare of others. Its declared purpose is to impose increased and added deprivation of the privilege to operate motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws. It contains no reference to fines or imprisonment or to any form of "punishment," and it imposes none.

The instant case involves only the finding of habitual offender and the resulting prohibition against operating motor vehicles upon the highways of Virginia. This Court has previously considered the question of constitutionality of a conviction for driving after a revocation of license under the Habitual Offender Act and dismissed the appeal "for want of a substantial federal question" in the case of *Harry Virgil Rexrode* v. *Commonwealth of Virginia*, reported in United States Supreme Court Reports, Vol. 23 L.Ed., No. 7, page 678. February 5, 1973. Insofar as it concerns that part of the act which petitioner has brought into question before this Honorable Court because of its prohibition against his driving, it is clear that the act is civil in nature and not criminal. In the parallel case of *Huffman* v. *Commonwealth*, 210 Va. 530, 172 S.E. 2d 788 (1970), the Supreme Court of Virginia stated the following:

> "In the first place, it is well settled that the constitutional prohibition against an *ex post facto* law applies to criminal proceedings and not to civil proceedings. *Commonwealth* v. *United Cigarette Co.*, 120 Va. 835, 839, 840, 92 S.E. 901, 902 (1917).
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> "In the next place, we have held that a proceeding to revoke an automobile driver's permit or license is a civil and not a criminal proceeding; that the revocation is not for the punishment of the offender, but is for the protection of the public in removing from the highways a dangerous driver. *Pritchard* v. *Battle*, 178 Va. 455,

462, 17 S.E. 2d 393, 395-96 (1941); *Butler* v. *Commonwealth,* 189 Va. 411, 423, 424, 53 S.E. 2d 152, 157 (1949); *Prillaman* v. *Commonwealth,* 199 Va. 401, 406. 100 S.E. 2d 4, 8 (1957)."

Since the *Huffman* case, *supra,* the Supreme Court of Virginia has said in *McIntosh* v. *Commonwealth,* 213 Va. 330, 333, 191 S.E. 2d 791 (1972):

> "We hold that the 1970 amendment which repealed § 46.1-387.2 (a) (5) does not operate retrospectively, either expressly or by necessary implication, and that the Habitual Offender Act, as amended, does not offend the provisions of the Fourteenth Amendment to the Constitution of the United States or the cognate provisions of the Constitution of Virginia."

Finally, petitioner cites from the case of *Bell* v. *Burson,* 402 U.S. 535 (1971) certain language related to "procedural due process required by the Fourteenth Amendment." Prior to his petition to this Court he has alleged no failure in respect to due process under the Virginia statutes, nor in relation to the proceedings finding him an habitual offender. There was certainly nothing in the *Bell* case which would intimate that the proceedings under the Habitual Offender Act, to prohibit a person from operating a motor vehicle on the highways, are criminal proceedings, or that such proceedings would be in conflict with the constitutional prohibition against *ex post facto* laws.

CONCLUSION

For the reasons herein expressed, we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that service was made pursuant to U.S. Supreme Court Rule 33, paragraph 1, by mailing three copies of Brief in Opposition by first class mail to Mr. Daniel Hartnett, Ayres, Hartnett & Custis, Court Green, Accomac, Virginia 23301, counsel of record for Ray Hulen Pless, petitioner, on or before filing the same with the Clerk of the Supreme Court of the United States.

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